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No. 92-1207

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF MARYLAND,

Petitioner,

vs.

ANTHONY GRANDISON, SR.,

Respondent.

On Petition for Writ of Certiorari to the Circuit Court for Somerset County, Maryland

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of authorities ii

Interest of *amicus curiae* 1

Summary of argument 2

Argument 2

I

The second *Teague* exception is the subject of great confusion in the lower courts 2

A. The *Teague* decision 2

B. Exceptions and innocence 3

II

Only rules essential to the prevention of miscarriages of justice qualify for the second exception 6

III

The *Mills* rule is not essential to prevent miscarriages of justice 11

Conclusion 12

TABLE OF AUTHORITIES

Cases

Beam v. Paskett, 966 F. 2d 1563 (CA9 1992) 4

Betts v. Brady, 316 U. S. 455, 86 L. Ed. 1595,
62 S. Ct. 1252 (1942) 9

Bouie v. City of Columbia, 378 U. S. 347,
12 L. Ed. 2d 894, 84 S. Ct. 1697 (1964) 3

Brown v. Mississippi, 297 U. S. 278, 80 L. Ed. 682,
56 S. Ct. 461 (1936) 9

Caldwell v. Mississippi, 472 U. S. 320,
86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985) 5, 9

Coker v. Georgia, 433 U. S. 584, 53 L. Ed. 2d 982,
97 S. Ct. 2861 (1977) 8

Desist v. United States, 394 U. S. 244, 22 L. Ed. 2d 248,
89 S. Ct. 1030 (1969) 6

Engle v. Isaac, 456 U. S. 107, 71 L. Ed. 2d 783,
102 S. Ct. 1558 (1982) 3

Enmund v. Florida, 458 U. S. 782, 73 L. Ed. 2d 1140,
102 S. Ct. 3368 (1982) 8

Ford v. Wainwright, 477 U. S. 399, 91 L. Ed. 2d 335,
106 S. Ct. 2595 (1986) 8

Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2d 346,
92 S. Ct. 2726 (1972) 9

Gideon v. Wainwright, 372 U. S. 335,
9 L. Ed. 2d 799, 83 S. Ct. 792 (1963) 7, 9

Graham v. Collins, 64 U. S. L. W. 4127
(Jan. 25, 1993) (No. 91-7580) 10, 11

Graham v. Hoke, 946 F. 2d 982 (CA2 1991) 5

Gregg v. Georgia, 428 U. S. 153, 49 L. Ed. 2d 859,
96 S. Ct. 2909 (1976) 8

Hopkinson v. Shillinger, 888 F. 2d 1286
(CA10 1988) 5

Jackson v. Virginia, 443 U. S. 307, 61 L. Ed. 2d 560,
99 S. Ct. 2781 (1979) 8

Kuhlmann v. Wilson, 477 U. S. 436, 91 L. Ed. 2d 364,
106 S. Ct. 2616 (1986) 4

Lockett v. Ohio, 438 U. S. 586, 57 L. Ed. 2d 973,
98 S. Ct. 2954 (1978) 8, 10

Mackey v. United States, 401 U. S. 667,
28 L. Ed. 2d 404, 91 S. Ct. 1160 (1971) 7, 10

McCleskey v. Kemp, 481 U. S. 279, 95 L. Ed. 2d 262,
107 S. Ct. 1756 (1987) 10

McCleskey v. Zant, 113 L. Ed. 2d 517,
111 S. Ct. 1454 (1991) 3

Mills v. Maryland, 486 U. S. 367 , 100 L. Ed. 2d 384,
108 S. Ct. 1860 (1988) 11

Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791,
55 S. Ct. 340 (1935) 9

Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543,
43 S. Ct. 265 (1923) 9, 10

Murray v. Carrier, 477 U. S. 478, 91 L. Ed. 2d 397,
106 S. Ct. 2639 (1986) 4

Palko v. Connecticut, 302 U. S. 319, 82 L. Ed. 288,
58 S. Ct. 149 (1937) 10

Penry v. Lynaugh, 492 U. S. 302, 106 L. Ed. 2d 256,
109 S. Ct. 2934 (1989) 4, 8

Rose v. Lundy, 455 U. S. 509, 71 L. Ed. 2d 379,
102 S. Ct. 1198 (1982) 9

Saffle v. Parks, 494 U. S. 484, 108 L. Ed. 2d 415,
110 S. Ct. 1257 (1990) 3, 5, 6, 7, 11

Sawyer v. Smith, 497 U. S. 227, 111 L. Ed. 2d 193,
110 S. Ct. 2822 (1990) 4, 6, 9, 11

Sawyer v. Whitley, 120 L. Ed. 2d 269,
112 S. Ct. 2514 (1992) 7, 8, 11, 12

Stone v. Powell, 428 U. S. 465, 49 L. Ed. 2d 1067,
96 S. Ct. 3037 (1976) 3

Sunal v. Large, 332 U. S. 174, 91 L. Ed. 1982,
67 S. Ct. 1588 (1947) 3

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334,
109 S. Ct. 1060 (1989) 2, 4-7, 9-11

Thompson v. Oklahoma, 487 U. S. 815,
101 L. Ed. 2d 702, 108 S. Ct. 2687 (1988) 8

United States v. Eichman, 496 U. S. 310,
110 L. Ed. 2d 287, 110 S. Ct. 2404 (1990) 4

Wainwright v. Sykes, 433 U. S. 72, 53 L. Ed. 2d 594,
97 S. Ct. 2497 (1977) 4

Walton v. Arizona, 111 L. Ed. 2d 511,
110 S. Ct. 3047 (1990) 10

Williams v. Dixon, 961 F. 2d 448 (CA4 1992) 5, 6

Woodson v. North Carolina, 428 U. S. 280,
49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) 9

Yates v. Aiken, 484 U. S. 211, 98 L. Ed. 2d 546,
108 S. Ct. 534 (1988) 5

United States Constitution

U. S. Const. art I, § 9, cl. 3 3

U. S. Const. art I, § 10, cl. 1 3

United States Statutes

18 U. S. C. § 700 4

28 U. S. C. § 2254(a) 3

State Statutes

Md. Code Ann. art 27, § 414(e)(3)
(Michie Supp. 1992) 12

Miscellaneous

A. Lewis, *Gideon's Trumpet* 237 (1964) 7

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

Collateral attacks on final judgments based on subsequent changes in the law are fundamentally unfair to the people for the same reason that *ex post facto* laws are unfair to individuals. Allowing such attacks in the absence of a substantial risk of an actual miscarriage of

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1. CJLF has received written consent from both parties to file this brief.

justice is contrary to the interests CJLF was formed to advance.

SUMMARY OF ARGUMENT

Teague v. *Lane* was a major reform in the law of habeas corpus. It protected the people against unfair *ex post facto* abrogation of judgments which were legal when entered, subject to two narrow exceptions. To preserve the vitality of this reform, the exceptions must be kept narrow.

The second exception has caused confusion in the lower courts, and better guidance is needed. That guidance can be found in the strong connection between this exception and the "actual innocence" exception of *Murray* v. *Carrier*. Just as *Sawyer* v. *Whitley* eliminated from the *Murray* exception all cases where the defendant is guilty and eligible for the death penalty, so should all rules dealing only with the sentencing of death-eligible defendants be excluded from the second *Teague* exception.

ARGUMENT

I. The second *Teague* exception is the subject of great confusion in the lower courts.

A. The Teague Decision.

Teague v. *Lane*, 489 U. S. 288 (1989) was a landmark decision, taking a giant step toward restoring balance and fairness to the criminal law. The effectiveness of that reform, however, depends on its proper implementation. Decisions such as the one in the present case threaten to nullify *Teague*.

The American legal tradition has long recognized that it is fundamentally unfair to declare an act illegal when it was understood to be legal at the time it was done. Criminal statutes having such an effect are expressly

prohibited by the Constitution, on both the federal and state levels. U. S. Const. art. I, § 9, cl. 3; *id.*, § 10, cl. 1. Retroactive expansion of criminal statutory prohibitions by judicial interpretation has long been recognized as so fundamentally unfair as to violate due process of law. See *Bouie* v. *City of Columbia*, 378 U. S. 347, 353-354 (1964).

Teague extends this basic principle of fairness to the people. The question on habeas corpus is not whether the trial court erred but whether the state is violating the Constitution by keeping the prisoner in prison. 28 U. S. C. § 2254(a). If the state obeyed the law in effect when it entered the judgment, it is fundamentally unfair to the people to declare their judgment illegal merely because the rules have since changed. See *Engle* v. *Isaac*, 456 U. S. 107, 128-129, n. 33 (1982).

Teague recognizes, however, that there may be circumstances where a judgment legal when entered must be declared illegal because of an overriding imperative on the other side. Thus, there are two *narrow* exceptions to the rule. See *Saffle* v. *Parks*, 494 U. S. 484, 487-488 (1990). The question in this case is whether the second exception will continue to be narrow, or whether it will swallow the rule.

B. Exceptions and Innocence.

Throughout the recent development of habeas corpus law, this Court has sounded two themes. First, the Court has placed limits on the writ in order to partially return to the old rule that habeas will not be used as a substitute for or repetition of the appeal. See *Sunal* v. *Large*, 332 U. S. 174, 178 (1947). To this end, limits have been placed on consideration of constitutional claims irrelevant to the accuracy of the result, *Stone* v. *Powell*, 428 U. S. 465 (1976); claims not timely raised in state court, *Engle* v. *Isaac*, *supra*, 456 U. S., at 481-482; claims not raised in the first federal petition, *McCleskey* v. *Zant*, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991); and attempts to relitigate

claims in a successive petition, *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986) (plurality). At the same time, the Court has increasingly recognized the overriding imperative to correct actual miscarriages of justice, i.e., the convictions of people who are actually innocent. *Murray* v. *Carrier*, 477 U. S. 478, 495-496 (1986).

Teague itself explicitly recognizes these common threads. In defining the problem as one of the scope of the writ, *Teague* relies on *Engle*, *Murray*, *Kuhlmann*, and *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). *Teague*, 489 U. S., at 308. Similarly, in setting out the exceptions, *Teague* noted that "our cases have moved in the direction of reaffirming the relevance of the *likely accuracy of convictions* in determining the available scope of habeas review," citing *Kuhlmann* and *Murray*. *Id*., at 313 (emphasis added). *Sawyer* v. *Smith*, 497 U. S. 227, 245 (1990) ("*Sawyer I*") similarly relied on procedural default/miscarriage of justice cases in its discussion of the second *Teague* exception.

From the very beginning, then, there has been a powerful connection between the *Teague* exceptions and the "actual innocence" exception of *Murray* and *Kuhlmann*. For the first *Teague* exception, the connection is simple and obvious. A person in jail for flag burning, 18 U. S. C. § 700, would be actually innocent. See *United States* v. *Eichman*, 496 U. S. 310 (1990). A person sentenced to death for rape would be "innocent of" (i.e., ineligible for) the death penalty. *Penry* v. *Lynaugh*, 492 U. S. 302, 330 (1989). This straightforward rule has caused little difficulty in the lower courts, with one appalling exception. See *Beam* v. *Paskett*, 966 F. 2d 1563 (CA9 1992), cert. pending, (No. 92-464) (finding exception applicable to sane adult convicted of rape and murder of a 13-year-old girl).

The second exception, however, has created more problems. Like the first exception, it is rooted in the need to prevent an actual miscarriage of justice, defined

as the conviction of an innocent person. *Teague*, 489 U. S., at 313. Unlike the first exception, however, "the precise contours of this exception" have proven "difficult to discern." *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990).

Misunderstanding of the second *Teague* exception is rampant in the courts of appeals. *Graham* v. *Hoke*, 946 F. 2d 982 (CA2 1991), cert. denied, 116 L. Ed. 2d 793, 112 S. Ct. 890 (1992) is a prime example. *Graham* held, in effect, that *any* rule which supplanted a prior rule "altered our understanding of a 'bedrock procedural element.' " *Id.*, at 994. As long as it has some accuracy-enhancing effect, it would qualify for the second exception. The "narrow" exception would therefore encompass virtually all new rules thought to enhance accuracy, and *Teague* would be a dead letter.

Graham was nonetheless decided in the state's favor under harmless error analysis. 946 F. 2d, at 997. How a violation of a rule which is an "absolute prerequisite to fundamental fairness," *Teague*, 489 U. S., at 314, can ever be harmless error is not explained.

Hopkinson v. *Shillinger*, 888 F. 2d 1286 (CA10 1988) is similar. The Court of Appeals in that case held that the rule of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) qualified for the second exception and then proceeded to find the error did not affect the jury in that case. 888 F. 2d, at 1292, 1295. The former holding was abrogated by *Sawyer* v. *Smith*, *supra*.

The present case is both an example of the confusion and an opportunity to correct it. The court below[2] relied primarily upon *Williams* v. *Dixon*, 961 F. 2d 448 (CA4

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2. The fact that this is a state habeas corpus case does not prevent application of *Teague*. Where a state makes collateral relief available for a federal claim, retroactivity is a federal question. See *Yates* v. *Aiken*, 484 U. S. 211, 217, 218 (1988).

1992), cert. denied, 121 L. Ed. 2d 445 (1992).[3] See Pet. App., 17-18. *Williams* quoted *Sawyer* v. *Smith* out of context and announced a rule that *all* of this Court's Eighth Amendment capital sentencing rules meet the accuracy-enhancing requirement for the second *Teague* exception. 961 F. 2d, at 454. *Williams* then launched into a "death is different" dissertation which, if accepted, would effectively abrogate *Penry* v. *Lynaugh*, *supra*, and apply the second *Teague* exception to all penalty phase rules, something this Court explicitly refused to do in *Sawyer I*, 497 U. S., at 227. The court below in the present case simply accepted this misinterpretation of *Teague*.

To clear up this confusion, *amicus* submits, the contours of the exception need to be more precisely defined. A statement that a rule "has none of the primacy and centrality of the rule adopted in *Gideon*," *Saffle*, *supra*, 494 U. S., at 495, provides insufficient guidance for lower courts. The proper guidance, *amicus* submits, can be found in recognition of the link between the *Teague* exceptions and the "actual innocence" rule of *Murray* v. *Carrier*.

II. Only rules essential to the prevention of miscarriages of justice qualify for the second exception.

Teague v. *Lane*, 489 U. S. 288 (1989) did not accept at face value Justice Harlan's assertion in *Desist* v. *United States*, 394 U. S. 244, 262 (1969) (dissent) that "all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas." Instead, *Teague* raised the threshold, "limiting the scope of the second exception to those new

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3. The present case is a better case for addressing *Teague* than *Williams* because, unlike *Williams*, in the present case there is no argument that the state waived *Teague*. Cf. *Williams*, *supra*, 961 F. 2d, at 456-459.

procedures without which the likelihood of an accurate conviction is *seriously* diminished." *Id.*, at 313 (emphasis added). This limitation is fully consistent with *Teague*'s concern for preventing miscarriages of justice. If it is unlikely that trials conducted before the rule resulted in the conviction of innocent people, then the state's interest in finality outweighs the benefits, if any, of applying the rule to overturn final judgments.

The conclusion which immediately follows is inevitable. In the last decade of the twentieth century, there are few, *if any*, such rules remaining to be made. "Because we operate from the premise that such procedures would be so *central* to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge." *Ibid.* (emphasis added). This is a very cautious understatement. The firestorm that swept through criminal procedure in the 1960's and 1970's left behind very little combustible material. We now have a system so heavily weighted in defendants' favor that there are no rules of such magnitude remaining to be made.

Gideon v. *Wainwright*, 372 U. S. 335 (1963) has been cited repeatedly as an example of the kind of rule which qualifies for the exception. *Teague*, *supra*, 489 U. S., at 311-312 (quoting *Mackey* v. *United States*, 401 U. S. 667, 693-694 (1971) (Harlan, J., concurring in the judgment)); *Saffle*, *supra*, 494 U. S., at 495. The reason is simple. Denial of counsel in the pre-*Gideon* era resulted in the conviction of many innocent people, including Gideon himself, who was acquitted on retrial. See A. Lewis, *Gideon's Trumpet* 237 (1964). Extension of the right to counsel to all felony defendants sharply reduced the number of fundamental miscarriages of justice. The procedural requirements promulgated under the Eighth Amendment are entirely different.

In *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 112 S. Ct. 2514 (1992) ("*Sawyer II*"), this Court was confronted with

the question of when a death sentence is a "miscarriage of justice" despite the facts that the defendant is actually guilty of murder, is actually eligible under state law, and is not within any of the categorical constitutional exclusions.[4] The majority said never; the concurrence said almost never. The majority held that "the 'actual innocence' requirement must focus on those elements which render a defendant eligible for the death penalty . . . ." 120 L. Ed. 2d, at 585, 112 S. Ct., at 2523. The concurrence would also include those cases where *no* reasonable sentencer would have imposed the death penalty. *Id.*, at 120 L. Ed. 2d, at 301, 112 S. Ct., at 2536 (citing *Jackson* v. *Virginia*, 443 U. S. 307, 316-318 (1979)).

Of all the *procedural* rules promulgated under the Eighth Amendment after *Gregg* v. *Georgia*, 428 U. S. 153 (1976) and its companion cases,[5] which ones constitute rules the nonobservance of which is *highly likely* to result in a miscarriage of justice? The answer, *amicus* submits, is *none*. The categorical exclusion rules, which qualify for the first exception under *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) take care of all of the ineligibility cases which the *Sawyer II* majority considered to be miscarriages of justice. Even if one accepts the view of the *Sawyer II* concurrence, that a miscarriage of justice would be possible despite eligibility, such a case must be extremely rare. Thus, Sandra Lockett would now be excluded by the rule of *Enmund*, *supra*. See *Lockett* v. *Ohio*, 438 U. S. 586, 589-591 (1978). None of this Court's other Eighth Amendment procedure cases presents facts on which *no* reason-

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4. See *Enmund* v. *Florida*, 458 U. S. 782 (1982) (felony murder accomplice with no intent to kill); *Coker* v. *Georgia*, 433 U. S. 584 (1977) (rape, not murder); *Ford* v. *Wainwright*, 477 U. S. 399 (1986) (insane at time of execution); *Thompson* v. *Oklahoma*, 487 U. S. 815 (1988) (under sixteen years old, no statutory minimum age).

5. We need not consider here categorical exclusions, which qualify under *Penry*, or the retroactivity of *Gregg* and its companion cases, which is a moot question.

able sentencer could find death to be the appropriate penalty, and indeed it is highly questionable whether *Lockett* is that clear.

At best, all of the post-*Gregg* procedural cases fit *Sawyer I*'s description of *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985). They are protections of some value and are thought to enhance accuracy of capital proceedings. *Sawyer I*, *supra*, 497 U. S., at 244. However, they are layered on top of a foundation of due process protections which apply to capital and noncapital cases alike. They are also layered on top of the basic structure of *Gregg*, *Furman* v. *Georgia*, 408 U. S. 238 (1972), and *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), which established the basic system of guided discretion we have today.

Enhancing the accuracy of a trial is not enough to qualify a rule for the second exception. A rule must also be a "watershed rule[ ] of criminal procedure, ..." *Teague*, *supra*, 489 U. S., at 311. In addition to *Gideon*, *Teague* alluded to three other cases that would have satisfied the second exception: *Brown* v. *Mississippi*, 297 U. S. 278 (1936) (beating a confession out of the defendant); *Moore* v. *Dempsey*, 261 U. S. 86 (1923) (mob dominated trial); and *Mooney* v. *Holohan*, 294 U. S. 103 (1935) (knowing use of perjured testimony by the prosecution). See *Teague*, *supra*, 489 U. S., at 313; *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (Stevens, J., dissenting). In each of the cases mentioned by *Teague*, this Court unanimously supported the announced right. *Brown* and *Mooney* were unanimous decisions, while in *Gideon* the three concurrences accepted its extension of the right to appointed counsel. See 372 U. S., at 345 (Douglas, J., concurring); 372 U. S., at 349 (Clark, J., concurring); 372 U. S., at 352 (Harlan, J., concurring).[6] Although two

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6. Although *Gideon* overruled *Betts* v. *Brady*, 316 U. S. 455 (1942), the *Gideon* Court did not see itself as making a new path in the law when it disregarded *Betts*, but instead was "returning to . . . old precedents." 372 U. S., at 344.

justices dissented in *Moore*, they did not dissent on the unconstitutionality of mob dominated trials, see 261 U. S., at 96 (McReynolds, J., dissenting), but instead dissented on the scope of habeas corpus, see *id.*, at 93.

This stands in sharp contrast to this Court's death penalty jurisprudence. Its entry into Eighth Amendment death penalty law sparked deep divisions within the Court. *Furman* was a 5-4 decision that mustered a majority only for the barest *per curiam* opinion. The bulk of the opinion was the many separate concurrences and dissents.

The divisiveness over capital punishment continues. There has been substantial disagreement within this Court in most of these decisions. There is even tension between the two main lines of death penalty jurisprudence. Several justices have noted the tension between the guided discretion requirement derived from *Furman* and the mitigating evidence line derived from *Lockett* v. *Ohio*, 438 U. S. 586 (1978). See *Graham* v. *Collins*, 64 U. S. L. W. 4127, 4135 (Jan. 25, 1993) (No. 91-7580) (Thomas J., concurring); *Walton* v. *Arizona*, 111 L. Ed. 2d 511, 535, 110 S. Ct. 3047, 3062-3063 (1990) (Scalia, J., concurring); *McCleskey* v. *Kemp*, 481 U. S. 279, 363 (1987) (Blackmun, J., dissenting); *Lockett*, *supra*, 438 U. S., at 622, 623 (White, J., concurring and dissenting). A branch of law born in such controversy cannot be part of the "small core of rules . . . ' "implicit in the concept of ordered liberty." ' " *Graham*, *supra*, 64 U. S. L. W., at 4132 (quoting *Teague*, *supra*, 489 U. S., at 311 (in turn quoting *Mackey*, *supra*, 401 U. S., at 693 (Harlan, J., concurring in part and dissenting in part) (in turn quoting *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937)))).

None of the post-*Gregg* procedural rules are "watershed rules of criminal procedure." See *Teague*, 489 U. S., at 311. None are "central to an accurate determination of innocence or guilt." See *id.*, at 313. None are essential to "the fundamental fairness that must underlie a

conviction or seriously diminish the likelihood of obtaining an accurate conviction. . . ." *Id.*, at 315.

This Court has examined three capital procedure claims under the second exception. Each time it has found that the claim did not come within the second exception. See *Graham*, *supra*, 61 U. S. L. W., at 4132; *Saffle*, *supra*, 494 U. S., at 495; *Sawyer I*, *supra*, 497 U. S., at 244-245. Given the confusion in the federal courts over the second exception, it is time to recognize that none of these cases will satisfy this test.

III. The *Mills* rule is not essential to prevent miscarriages of justice.

The critical question is whether the rule of *Mills* v. *Maryland*, 486 U. S. 367 (1988) is an "absolute prerequisite to fundamental fairness." *Teague* v. *Lane*, 489 U. S. 288, 314 (1989). Is the *Mills* rule "so central to an accurate determination of innocence or guilt" that under the earlier Maryland practice "the likelihood of an accurate conviction [was] seriously diminished"? *Id.*, at 313.

Translating "actual innocence" into the penalty phase as the *Sawyer II* majority did, the answer is simply and clearly no. Once a defendant has been found guilty of murder and eligible for a death sentence, the propriety of that sentence is a matter of opinion, and its imposition is never a miscarriage of justice.

Using the *Sawyer II* concurrence's approach requires a bit more analysis, but it yields the same result. The *Mills* majority was concerned that the unanimity requirement would allow one holdout juror to prevent the others from giving effect to mitigating evidence and thus improperly impose the death penalty. 486 U. S., at 384. How likely is this scenario in a case where "in view of all of the evidence, mitigating circumstances so far outweighed aggravating circumstances that *no reasonable sentencer*

would have imposed the death penalty"? See *Sawyer* v. *Whitley*, 120 L. Ed. 2d 269, 301, 112 S. Ct. 2514, 2536 (1992) (Stevens, J., concurring in the judgment) (emphasis added). How likely is such a verdict, so clearly contrary to the evidence, to survive review in the normal course of state procedure, including a review of whether the evidence supports the death sentence by the state high court? See Md. Code Ann. art. 27, § 414(e)(3) (Michie Supp. 1992). That possibility, *amicus* submits, is far too tenuous to justify the fundamental unfairness to the people of an *ex post facto* application of *Mills* to judgments already final.

A writ of certiorari is needed in this case to establish a categorical rule that *none* of the post-*Gregg* fine tuning of capital sentencing procedure qualifies for the second *Teague* exception. This bright line rule would make explicit what is already implicit in the *Teague* cases. All that remains is for this Court to draw the line.

CONCLUSION

A writ of certiorari should be granted.

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Respectfully submitted,

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